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No. 271

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

and

PIASECKI AIRCRAFT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 840, pray that a writ of certiorari issue to reveiw the decision and decree of the United States Court of Appeals for the Third Circuit entered on May 22, 1963, denying the petition filed by the Petitioners to review the order issued by the National Labor Relations Board, denying the Petitioners' Motion for an Order Directing Back Pay Proceedings and other relief.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pages 36 to 37) is recorded at —— F. 2d ——. The order of the Board denying Petitioners' Motion (Appendix B, *infra*, pages 41 to 42) is unreported.

JURISDICTION

The opinion of the court below was filed on April 26, 1963 and its decree was entered on May 22, 1963. The jurisdiction of this court is invoked under 20 U.S.C. 1254 and Section 10 (f) of the National Labor Relations Act, as amended, (61 Stat. 146, 29 U.S.C. 160 (f) hereinafter called the "Act."

QUESTIONS PRESENTED

The Court of Appeals enforced the Board's Order which left unresolved issues in respect to back pay due discriminatees named in the order, individual reinstatement placement of such discriminatees, and as to whether alleged changed circumstances and conditions between the time of the hearing before the Board and the Court's decree were such as to lawfully excuse the employer of its back pay, reinstatement, recognition and bargaining obligations under the Board's order.

The employer proposed a settlement of these unresolved issues which was accepted by a Regional Director for the Board over the objections of the charging parties, in which proposal 125 employees entitled to reinstatement under the order were denied reinstatement. Back pay in a lump sum, less than the full amount accruing under the order, was accepted without relation to the actual amount due each discriminatee under the order.

The preferential hiring list provided by the order was [redacted]ded and the employer was wholly exonerated from its

obligation to recognize and bargain with the charging parties as required under the order.

Charging parties, aggrieved by the Regional Director's action, moved the Board for a hearing at which they could appear in person or by counsel, to call, examine and cross-examine witnesses, and produce documentary and other evidence in support of the sustention of their aggrievement, and as a basis for the Board's consideration of and findings upon the unresolved issues and the matters in dispute, and in order that the charging parties could be assured of a record upon which a review as parties aggrieved before the Appelate Court under 10 (f) of the Act could be predicated in the event the Board erred in its resolution of such issues. The Board summarily denied the charging parties' motion, without hearing found no facts upon which its assumption of "substantial compliance" with its order was based, and approved the employer's deficient proposal based upon the sole recommendation of the Board's General Counsel, a party to the proceedings. The lower court, with the record before it, composed only of the Board's order and the charging parties' motion, affirmed the Board without ordering the Board to grant the charging parties a hearing, or affording a hearing for the charging parties before the lower court.

The First question presented is:

Under such circumstances, are charging parties, as parties to the proceedings, entitled to a hearing before the Board or the lower court as requested, as a matter of right, at which hearing charging parties may appear in person, or by counsel, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence material to such unresolved and unsettled issues and in support of charging parties' objections to the proposed settlement?

A correlative question is: Is the Board's denial of a hear-

ing and the acceptance of the respondent employer's offer of partial settlement of the Board's order as substantial compliance thereof, solely on the recommendation of the Board's General Counsel and without hearing, a denial of due process of law and a violation of the Administrative Procedure Act and the National Labor Relations Act, as amended?

The Second question presented is:

Is it a denial of due process of law for the Board to deny the charging parties a hearing and for the lower court to affirm such denial based upon a record void of any evidence and void of findings of basic facts sufficient to support the reasons for the Board's action.

The Third question is:

Does the Board violate due process of law, the Administrative Procedure Act and the National Labor Relations Act, as amended, when it deprives charging parties and discriminatees of benefits acquired under an enforced Board order without a hearing of which such parties may have notice, and may appear in person, or by counsel, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence?

The Fourth question presented is:

May the Board accept less than full compliance with and satisfaction of its enforced order, thus exonerating a respondent from satisfying the full affirmative requirements of the enforced order?

STATUTES AND RULES AND REGULATIONS INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are as follows:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States * * * the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of title 28, United States Code * * *." 29 U.S.C. 160 (f)

Pertinent provisions of the Board's Rules and Regulations are as follows:

"The term 'party' as used herein shall mean the regional director * * * including, without limitation, any person filing a charge * * *." Section 102.8

"Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence * * *." Section 102.38

"After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a Respondent concerning the amount of back pay due which can not be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back pay specification in the name of the Board * * *." Section 102.52

STATEMENT OF CASE

On November 27, 1956, the International Union, United Automobile, Aerospace[1] and Agricultural Implement Work-

[1] The word "Aerospace" was substituted for the word "Aircraft" in the name of the Union at the International Union's convention of May, 1962.

ers of America, UAW, AFL-CIO, and its Local 840, hereinafter referred to as the "charging parties," filed a charge with the National Labor Relations Board, hereinafter referred to as the "Board," against the Piasecki Aircraft Corporation, hereinafter referred to as "Piasecki" or the "employer."

After the General Counsel's reversal of the Regional Director's refusal to issue a complaint, the complaint came on for hearing and in due course the Board entered an order on March 25, 1959, which was enforced by the lower court on September 7, 1960.

Piasecki's Petition for Writ of Certiorari was denied on January 9, 1961, *Piasecki Aircraft Corporation* vs. *NLRB*, No. 541, 364 U.S. 933.

On or about August 30, 1961, Piasecki filed a Petition, Affidavit and Order for Partial Suspension of Decree and Remand to N.L.R.B. by Virtue of Change of Circumstances with the lower court. Piasecki noted that on the date of the Court's decree "Piasecki had no plant at New Castle, Delaware."

Piasecki asked the Court, among other things, that the proceedings be remanded to the National Labor Relations Board "for investigation, report and order in accordance with is usual procedure, to determine:

> (a) whether or not Piasecki's New Castle plant and its Philadelphia plant together ever constituted one plant; (b) what sums of money are required to be paid by Piasecki to make the named individuals whole for any loss of pay in view of such determination as the N.L.R.B. may make with respect to the preceding question; * * *"

The petition filed by Piasecki alleged that on December 30, 1959 it divested itself of its New Castle plant operations and had transferred such operations to its Philadelphia plant.

The lower court denied the petition on September 13, 1961.

The denial of Piasecki's petition left to the Board the resolution of whether or not Piasecki's New Castle plant and its Philadelphia plant together ever constituted one plant, and what sums of money were required to be paid by Piasecki to make the named individual discriminatees whole for any loss of pay under the Board's order, as well as other unresolved issues, including reinstatement placement of discriminatees. Final action on these issues was effected by the Board without hearing, of which the charging parties complained.

On June 1, 1962 charging parties filed their Motion for an Order Directing Back Pay Proceedings and Other Relief, alleging that on or about May 25, 1962 said "Charging Parties were advised by the Regional Director of the Fourth Region of the National Labor Relations Board, by telephone, that a proposed settlement agreement acceptable to him had been made which provided for the payment of $145,000.00 for settlement of all back pay to the discriminatees and the reinstatement at Piasecki's Philadelphia establishment of (the following) eight discriminatees, to whom will be paid an additional $1,000.00 each as payment for wages lost by reason of Piasecki's failure to transfer said employees to its Philadelphia establishment when it closed its New Castle establishment."

Said charging parties prayed for an order of the Board as follows:

(1) That a back pay proceedings be directed in conformity with Sec. 102.52 of the Board's Rules and Regulations.

(2) That an immediate hearing be set thereon.

(3) That at said hearing the Charging Parties be granted the right to appear in person or by counsel to

call, examine and cross-examine witnesses and to introduce in the record documentary or other evidence in conformity with the Rules and Regulations of the Board.

(4) That the Charging Parties be granted all other and further relief to which they may be entitled in the premises."

In their motion, the charging parties complained that the proposed settlement did not constitute full compliance with the Board's order in that said proposed settlement did not provide for the restitution of all back pay owing discriminatees, reinstatement of all employees entitled to reinstatement under the Board's order, and recognition of the charging parties by Piasecki as required under the Board's order.

On July 9, 1962 the Associate Executive Secretary of the Board, by direction of the Board, ordered that the motion filed by the charging party be "denied," although the charging parties were not allowed to introduce or present any evidence to support the allegations of their motion.

From the Board's order denying the charging parties' motion, charging parties filed their Petition for Review in the lower court, whereupon the Board filed a Motion to Dismiss Petition for Review and to Treat as a Petition for Writ of Mandamus, and Other Relief Ancillary to Case No. 12,912 (the initial enforcement proceedings before the Court).

The petitioners then filed a Motion in the alternative requesting the lower court to set the matter for hearing in the lower court in the event that the motion of the Board were granted.

In support of this motion, the charging parties stated:

"there is serious controversy and conflict in respect to certain facts which are relied upon by the General

Counsel to support his contention that the Board's action, taken in settlement of this Court's decree, was not an abuse of discretion, or arbitrary or capricious, that the Petitioners were accorded a full right to be heard on compliance issues and upon their objections to the compromise settlement, and that the compromise settlement agreement achieved compliance with the provisions of this Court's decree; that a resolution of the conflict in such evidence may only be resolved by the taking of testimony and directing trial on such issues."[2]

By its opinion and decree, the lower court simply affirmed the Board's denial of the Petitioners' motion for an order directing back pay proceedings and other relief, and did not specifically pass on the foregoing motions filed by the Board and the charging parties in the lower court.

The decree in Case No. 12,912, as well as the Board's order which it enforced, left certain issues for further, final action by the Board[3] before contempt would lie.

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[2] While the court below in its opinion drew a conclusion that "The Union was allowed every opportunity to present its views on the question of compliance and in disapproval of the settlement," the record is barren of any facts upon which such conclusion may be based. Moreover, it is charging parties' claim that not only does a charging party have a right to present its views, but it is entitled to support its views in a hearing wherein it may be allowed all the safeguards of due process of law (See *infra*). Surely the charging parties' rights, if they had any, exceeded the expression of "views."

[3] This lower court said in its opinion, in Case No. 12,912, 280 F. 2d 575:

The Board was justified in its conclusion that but for the discriminatory policy pursued by Piasecki, the former Bellanca workers would have been hired to fill the vacancies for which they were qualified. Its affirmative order that they should be hired and reimbursed for losses as a remedy is reasonable and well within the power conferred upon the Board. Section 10 (c). *As noted by the Trial Examiner, the record does not disclose with precision which employees would have been hired, and when, in the absence of the discriminatory practices, but those issues may be determined at compliance proceedings.* (Italics ours.)

These issues and those related to these issues were:

(1) The computation of back pay due each discriminatee.

(2) The determination of the individual reinstatement rights of each individual discriminatee.

(3) Whether the New Castle operations were terminated.

(4) Whether the alleged termination of New Castle Plant operations affected the reinstatement rights or back pay due any individual discriminatee.

(5) Whether the alleged closing of the New Castle Plant was to escape the consequences of the Board's order.

(6) Whether there were interchanges of work and personnel between the New Castle and Philadelphia Plants.

(7) Whether the Philadelphia and the New Castle Plants were a "single enterprise."

(8) Whether conditions in connection with Piasecki's operations changed to such an extent as to relieve Piasecki of its obligation to bargain.[4]

(9) Whether Piasecki destroyed the possibility of collective bargaining by allegedly terminating its New Castle Plant.[5]

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[4] Although the Court entered its decree on September 7, 1960, Piasecki stated in its "Petition * * * for Partial Suspension of Decree * * *": "At the time this Court entered its decree of September 7, 1960, Piasecki had no plant at New Castle, Delaware, having *** divested itself thereof on December 30, 1959. ***" (Page 4) Had Piasecki seriously considered that the Board's order did not embrace the Philadelphia Plant, surely it would have raised the question before the entering of the decree.

[5] The Board has said, "We do not agree with the Trial Examiner that it was necessary for the record affirmatively to show that the respondent would have continued to operate its plant, *absent unlawful motivation, in order to warrant a back pay award.* ***" Any uncertainty as to continued operation

(10) Whether in light of the evidence and the Board's precedents Piasecki should have been required to provide back pay until the dischargees were able to obtain substantially equivalent employment.[6]

(11) Whether or not the facts in this case require that interest should be allowable on back pay, computed. (*Isis Plumbing & Heating Co.*, 138 NLRB No. 97)

It is upon these and other related and unresolved and unsettled issues which the charging parties sought hearing, the right to produce evidence by examination and cross-examination of witnesses, and to argue before the Board, the sole agency by statute with jurisdiction to listen, adjudicate and pass final judgment on these questions, all of which was denied.

It is apparent that much of the evidence involving these issues, such as payroll records, was in the sole custody of Piasecki, thus unavailable to the charging parties except by subpoena and cross-examination.

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of Darlington's plant—based upon some reason other than its unlawful retaliation against the employees,—*is a matter to be determined at the compliance stage of the Board's proceeding.*" (Italics ours) *Darlington Manufacturing Co.*, 139 NLRB No. 23.

[6] Cf. *Darlington Manufacturing Co., supra.*

Reasons Relied Upon for Issuance of the Writ

I. *The lower court in affirming the board's order denying the charging parties' motion for a hearing of those unresolved issues left for further action by the Board's initial order relating to back pay for discriminatees, and reinstatement placement of discriminatees, and relating to whether changed conditions since the Board's initial hearing exonerated the employer from its obligations to make back pay, reinstate discriminatees and recognize and bargain with the charging parties in conformity with Board's initial order, and the Board's acceptance of the employer's proposed partial settlement of the Board's initial order solely upon the recommendation of the Board's general counsel as final disposition of such issues, with no means afforded whereby such action thereon could be evaluated, denied rights secured to the charging parties, as parties to the proceedings; denied due process of law under the Fifth Amendment, Constitution of United States; violated the Administrative Procedure Act; rendered a decision in conflict with the principles accepted and applied in other circuits and this court; and decided an important question of federal law in respect to the administration of the National Labor Relations Act which has not been but should be settled by this court.*

First: This court has held in *Amalgamated Utility Workers* vs. *Consolidated Edison Co.*, 309 U.S. 261, as early as 1940, that charging parties were persons "aggrieved" under Section 10 (f) of the Act, 29 U.S.C. 160 (f). *Accord: Marine Beneficial Association, No. 13* vs. *NLRB*, 202 F. 2d 546 (CA-3); *Textile Workers of America* vs. *NLRB*, 294 F. 2d 738. This court held in *Consolidated Edison* that a person

"aggrieved" is afforded an opportunity, by Section 10 (f), to contest the Board's final order before the Court of Appeals, and that such procedure is "assimilated to that provided in Section 10 (e) when the Board seeks an enforcement of its order."

Moreover, the person "aggrieved's" appeal is based upon "the record in the proceedings, certified by the Board, as provided in Section 2112, of Title 28, United States Code," Section 10(f). See also Administrative Procedure Act, 5 U.S.C. 1005(b), 1006(d), 1007(b), and *Marine Engineers Beneficial Association* vs. *NLRB, supra.* The right to "contest" anticipates the right to make a record; otherwise the right to contest would be a futility.

As late as 1957, a Trial Examiner in an unfair labor practice proceeding refused to concede that the charging party had the right to make its record during the progress of a hearing on unfair labor practices, and ruled that a charging party "could participate in the hearing only to the extent the General Counsel might permit," and that the Union could not examine or cross-examine witnesses as to any matters that had been touched upon by the General Counsel in his own interrogation of the witnesses." *John L. Clemmey, Inc.*, and *United Steelworkers of America*, 118 NLRB 599, 600. In Footnote 1, page 600, the Board, citing Section 102.28 of its Rules and Regulations, said: "A person filing an unfair labor practice charge is a 'party' within the meaning of the rule (Section 102.8 of the Board's Rules and Regulations), and is entitled to participate fully in the hearing." *Accord: Rickert Carbide Die, Inc.*, 126 NLRB

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[1] While the Board in the *John L. Clemmey* case, *supra*, refused to restrain the participation of a charging party "to the extent the General Counsel might permit", incongruously in the instant case, it allowed the General Counsel absolute power to effect a settlement with the respondent without deference to any rights of the charging parties to "participate fully in the hearing" or to contest the settlement.

757. (Footnote 3) *International Brotherhood of Boiler Makers*, 95 NLRB 1191, 1192.

Thus the Board, unlike its Trial Examiner, by such interpretation of its rule, concedes that during a hearing on an unfair labor practice complaint *in progress*, a charging party may exercise the right, under Section 102.38 of its Rules and Regulations, to "appear at such hearing in person, by counsel, or other representative, to call, examine, and cross-examine witnesses, and introduce into the record documentary or other evidence," and to make its record so that the Court of Appeals, under an appeal pursuant to Section 10 (f) "has something to go on." cf. *Marine Engineers Beneficial Association* vs. *NLRB*, *supra*, 549.

Nevertheless, the Board has never accepted as a requirement of its Rules or the Act that the charging party is entitled to a hearing or even that the charging party is entitled to a presentation on the record of the Board's reasons for or the basic facts upon which the Board bases its final action in those unfair labor practice cases in which the General Counsel and the Respondent conclude settlements over the objections of the charging party after the issuance of the complaint but before hearing thereon.

In 1953 the Court of Appeals for the Third Circuit (*Marine Engineers Beneficial Association* vs. *NLRB*, *supra*) disapproved of the Board's policy of settling an unfair labor practice complaint between the General Counsel and the Respondent without a hearing over the objections of the charging party and ordered a hearing. The court recognized that the charging party would have nothing to base his objections upon "unless there is a hearing and a record is made so that the court has something to go on."

Again in 1961, in a similar case, *Textile Workers of America* vs. *NLRB*, 294 F. 738, the Court of Appeals for the District of Columbia admonished the Board that its order,

based upon a settlement between the General Counsel and the Respondent, could not stand without either (1) "a reasonable opportunity for [the charging party] to be heard on its objections," or (2) "a presentation on the record of reasons for acceptance of the stipulation[8] as a basis for the order notwithstanding the [charging party's] objection—a presentation which in the light of those objections would enable the reviewing court to make an intelligent decision as to whether the Board's action was within the Board's discretion. By opposing these appeals, it is clear that the Board has not accepted the proposition that a charging party has any rights, as a "party," except during the *progress* of an unfair labor practice hearing. *John L. Clemmey, Inc., supra.*

If the instant case is comparable to the *Mariñe* and *Textile* cases *supra*, the Board did not fulfill the responsibilities imposed upon it by these cases and *the lower court*, in affirming the Board, *is in direct conflict with these cases.*

Even though these cases may be distinguished from the instant case, the fact remains that the Board insists, now with the approval of the Court of Appeals, that it can settle and compromise *ex parte*, on the sole recommendation of its General Counsel, unlitigated issues involved in an unfair labor practice proceedings over the objection of a charging

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[8] The case of *International Union* vs. *NLRB*, 231 F. 2d 237 (CA-7) lends support to the proposition that the General Counsel and the respondent may not enter into a stipulation by way of settlement of an issue over the objection of the charging party without the Board affording the charging party an opportunity to submit evidence. In such case, the court held that while the General Counsel, as prosecutor, had power to enter into a stipulation in which the charging party did not concur, to the extent that it did not join the stipulation, it was entitled to submit evidence to contradict or explain the parts thereof in which it did not join.

The lower court's affirmance of the Board's refusal to allow the charging party to submit evidence in contradiction to the proposed stipulation of settlement effected by the General Counsel and the respondent was in direct conflict with the teachings of the foregoing case.

party without recognizing any rights at all in the charging party. In other words, the charging party is not an indispensable party to any settlement proceedings and may be ignored without legal consequences.

Except in the *Edison* case *supra* in which this court, among other things, held that a charging party was a person "aggrieved" under 10 (f), this court has not considered the extent to which a charging party may participate as a matter of right in an unfair labor practice proceeding before the Board. If is clear from the Act that Congress must have attached importance to the role of a charging party since Board action may only be initiated by a charge filed by a charging party (Section 10 (b)). Moreover, Congress allowed the charging party the status of a person "aggrieved" so that the charging party could "contest" the Board's final order in the Court of Appeals (*Edison* case, *supra*). No doubt Congress had in mind the profound statement of Justice Brandeis, dissenting in *Olmstead* vs. *U.S.*, 277 U.S. 438, 479:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."

In *Local 112, Industrial Workers* vs. *Rothman*, 209 F.S. 295, decided in October, 1962, a case contested by the Board, the court decided that the charging party had the right to be heard after issuance of a complaint upon its objections to a settlement agreement entered into between the General Counsel and a respondent. The Court said:

> "What would, therefore, appear from a reading of Section 3 (d) of the Act and Section 101.9 and 102.8 of the regulations, is that neither Congress nor the Board, by any statute or regulation, placed within the hands of the General Counsel the authority to settle

complaints after their issuance *absent the agreement of all parties,* * * *." (Italics ours.)

If this is the law, then the lower court erred.

Thus the weight of judicial authority, although resisted by the Board as late as October, 1962, directs the Board to afford a charging party a hearing upon its objections to a settlement proposed by the General Counsel and the Respondent after the issuance of a complaint.

Without the application of specious reasoning or offending the desires of due process, we can not find a valid distinction between the situation where settlement is effected after the complaint is issued, and before an order is entered, and where, as here, an order is entered and enforced and settlement is made thereafter of unresolved and unlitigated issues involving back pay for discriminatees, reinstatement placement for discriminatees, and whether changed conditions warrant partial or whole exoneration of the employer's obligations under the order.

Thus we seek a reversal in this court of the proposition of law established by the Board and the lower court that back pay, reinstatement placement for discriminatees and partial or complete exoneration of a respondent's obligations, under the Board's order, may be settled between the General Counsel and a Respondent without the charging party's agreement and over its objections without hearing. This is a question of first impression in this court and is of utmost importance to the administration of the Act, and to union charging parties since it deprives them of a means of effectively and diligently representing their members' interests, a duty imposed upon them by statute.

Both the Board and the lower court have held that charging parties, in the face of a settlement by the respondent and the General Counsel, are without right to object if they

are not in total agreement with a settlement involving back pay, reinstatement placement or an employer's partial or complete exoneration of the Board's order, even though it may involve unresolved and controverted issues. In this they are in conflict with the foregoing cited cases.

Second: We have shown that during the *progress* of a hearing on an unfair labor practice complaint, charging parties are entitled to exercise the rights of "parties" to the proceedings, and that the weight of judicial authority is that after the complaint is issued and before a hearing is had, charging parties are entitled to a hearing upon the objection to a settlement proposed by the General Counsel and Repondent. Thus it would follow that if the instant proceedings fell within the above category, the charging parties would have been entitled to a hearing.

Had the Trial Examiner or the Board denied the charging parties full participation in the initial hearing, the relief which would have been afforded by the Board would have been "to afford the charging party an opportunity for full participation." *International Brotherhood of Boiler Makers, supra.*

By reason of the fact that the instant proceeding was a continuation of the initial proceedings or a "supplemental proceedings" before the Board, the charging parties likewise were entitled to "full participation" which they were unlawfully denied.

The purpose of the instant proceedings before the Board was to complete and make final that which the Board failed to complete and which it reserved for completion until such time as its order and findings of unfair labor practices were affirmed by the Appellate Court. In a supplementary hearing on back pay and reinstatement, the Board "has the same power it would have had if it had gone into the question on its initial hearing, and its conclusions are subject to the

same judicial review."[2] *NLRB* vs. *C.C.C. Association*, 306 F. 2d 534, 539 (CA-2).

This court has said that " * * * the fixing of back pay * * * is one of the functions confided solely to the Board." *Nathanson* vs. *NLRB*, 344 U.S. 25, 29.

In *NLRB* vs. *N.Y. Merchandise Co.*, 134 F. 2d 949 (CA-2), the Court said that the Board must fix back pay and reinstatement rights "as an original tribunal." The court considered Board action at this level to be "not as part of a proceeding for contempt, but as part of the Board's duty to complete or make final what it very properly left undecided in its first order."

At this stage of the Board's proceedings, contempt will not lie because the Board has neither determined the amount of back pay nor the reinstatement placement of the discriminatees as "an original tribunal." *NLRB* vs. *N.Y. Merchandise Co., supra*, 952; *NLRB* vs. *Deena Artware*, 361 U.S. 398, 410; *NLRB* vs. *Deena Artware*, 261 F. 2d 503, 508. Thus the lower court was without jurisdiction to pass upon whether the respondent was in contempt of its decree which is in effect did in affirming the Board's action on charging party's motion exonerating the respondents from full compliance with the decree.

At this stage of the proceedings, the Board "must, as upon other issues, give the employer a hearing, at which he may 'adduce' his evidence and be allowed to present his case." *NLRB* vs. *N.Y. Merchandise Co., supra*, 952. The Board's Rules and Regulations, 102.52-102.59, recognize this right in the respondent in connection with the determination

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[2] If the action of the Board at this stage of the proceedings is subject to the same "judicial review" under Section 10 (f) of the Act, the hearing should have been ordered so that the charging parties could have made their record upon which a review under Section 10 (f) could have been predicated.

of back pay.[10] Charging parties maintain that charging parties should likewise enjoy this right.

Since the other parties to the instant proceedings, the Regional Director of the Board, the respondent, (Section 102.8) and the General Counsel, *Lewis* vs. *NLRB*, 357 U.S. 10, under the Board's Rules and Regulations, are entitled to a hearing, it must follow that the charging parties, as parties to the proceedings, are entitled to a hearing also. Any other interpretation of the Rules would be discriminatory and unconstitutional. *Inland Steel Co.* vs. *NLRB*, 109 F. 2d 9 (CA-7).

Since the proceedings before the Board in the instant case were a continuation of its initial hearing, charging parties were entitled to exercise the same rights, which included the right to participate "fully" in a hearing. Thus the Board and the lower court were in error in denying a hearing to the charging parties.

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[10] Sections 102.52 to 102.59 of the Board's Rules and Regulations provide for back pay proceedings when "a controversy exists between the Board and a respondent concerning the amount of back pay due which can not be resolved without a formal proceeding * * *." Such proceeding is governed by the same procedures as set forth in Sections 102.24 to 102.51. (Section 102.59) Regulations governing back pay proceedings are not available to charging parties if a controversy exists between the Board and the respondent and the charging parties concerning the amount of back pay due. Thus a charging party, by the rule, is not afforded a hearing if it is in disagreement with the General Counsel's or the Board's informal agreement with the respondent in respect to back pay due, although, incongruously, if a back pay proceeding were commenced, it would appear that the charging party could exercise its full rights as a party, including the right, of course, to file a petition for review under Section 10 (f) of the Act. It is further significant that except for the rules and regulations of the Board, 102.15 to 102.51, the Board has provided for no procedures for the resolution of issues which were with the Board for determination after the enforcement of the Board's order in the instant case. It would seem to follow, therefore, that the only means afforded by the Rules and Regulations of the Board for resolving these issues would be pursuant to the Rules and Regulations governing the hearing on the initial complaint as a continuation of such proceeding. Such procedure makes a hearing mandatory (Section 102.34), as does the Act, Section 10 (b).

Third: The Administrative Procedure Act has been held applicable to Board action. *Universal Camera Corp.* vs. *NLRB*, 340 U.S. 474; *Marine Engineers Beneficial Association No. 13* vs. *NLRB, supra; Raser Tanning Co.* vs. *NLRB*, 276 F. 2d 80 (CA-6); *NLRB* vs. *Cleveland Trust Co.*, 214 F. 2d 95 (CA-6).

Under such Act, the charging parties are entitled to a hearing. 5 U.S.C. 1006 (c) grants a party the right to "present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a true disclosure of the facts."

It is also clear that under the Administrative Procedure Act, the charging parties are entitled to a review of the Board's action in the instant case. Section 5 U.S.C. 1009 (a) provides "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof." And 5 U.S.C. 1009 (c) provides: "* * * every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *."

Indeed, it is next to impossible to conceive of "agency action" which can be "more" final than the settlement of back wages which forever forecloses like claims, a settlement of reinstatement claims without recourse, and the complete obliteration by settlement of the charging party's chances for recognition under the Board's order, all of which was accomplished by the Board's action in this case.

Moreover, the Administrative Procedure Act further provides that in reviewing agency action, "the Courts shall review the whole record," 5 U.S.C. 1009 (e), and that the "exclusive record" shall be "the transcript of testimony and exhibits together with all papers and requests filed in the proceedings," U.S.C. 1006 (d). It is clear, therefore,

that if the charging parties were entitled to an appeal under the Administrative Procedure Act, the appeal would be superfluous and a futility unless they were permitted to make a record. Thus the denial of a hearing to the charging parties deprived them of the means whereby they could present to a reviewing court "the transcript of testimony and exhibits, together with all papers and requests filed in the proceedings." The action of the Board in denying charging party's motion thus was clearly in violation of the Administrative Procedure Act.

Fourth: By basing its order solely upon the recommendations of the General Counsel, a party to the proceedings, neither the requirements of a fair hearing nor the Administrative Procedure Act were met. Indeed, Congress, in the Administrative Procedure Act, 5 U.S.C. 1004 (c), sought to avoid the amalgamation of the prosecutor and the judge in the same person or persons. Such was also the objective of the Taft-Hartley Act (Section 3 (d) of the Act). By basing its decision solely upon the recommendation of the General Counsel, the Board reunited the functions of the General Counsel and the Board and acted counter to the objective of the Administrative Procedure Act in its desire to curtail and change the embodying in one person or agency the duties of prosecutor and judge. *Borg-Johnson Electronics Co.* vs. *Christenberry*, 169 F. Supp. 746; *Pinkett* vs. *U.S.*, 105 F. Supp. 67.

5 USC 1004 (c) provides in part, "* * * no officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or *advise in the decision*, recommended decision or agency review, pursuant to Section 8, except as a witness or counsel in public proceedings." (Italics ours.)

In basing its order solely on the recommendation of the

General Counsel, the Board violated such section. Moreover, the action of the Board was wholly invalid and flies in the teeth of the teachings of *Morgan* vs. *U.S.*, 304 U.S. 1, 19, in which the court reversed an order of the Secretary of Agriculture, stating:

> "If, in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know the contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without fair hearing."

The record in the instant case reveals a comparable situation wherein, without hearing, the General Counsel, a party to the proceedings, settled and compromised all unresolved issues in respect to the amounts of back pay due discriminatees, which of the discriminatees were entitled to reinstatement and whether alleged changed conditions exonerated the employer from the consequences of the Board's order.

Under these circumstances not only was the Administrative Procedure Act violated, but the charging parties were denied a fair hearing.

Moreover, due process was also denied charging parties when they were denied the right of cross-examination, an important evidentiary source since without its use, material facts in the custody of the employer only were not available to the charging parties. *Greene* vs. *McElroy*, *supra*, Footnote 25, 496; *Automobile Sales Co.* vs. *Bowles*, 58 F. Supp. 469, 473; *Southern Stevedoring Co.* vs. *Voris*, 190 F. 2d

275, 277 (CA-5); *Reilly* vs. *Pincus*, 338 U.S. 269; *Wheeler* vs. *NLRB*, 52 LRRM 2138 (CA-DC).

The right, under the due process clause, to a full hearing also includes the right to introduce evidence. *Baltimore & Ohio Railroad* vs. *U.S.*, 298 U.S. 349, and it has also been said that "the denial of a hearing granted by statute is a denial of due process of law." *Storer Broadcasting Co.* vs. *U.S.*, 220 F. 2d 204, 207 (CA-DC).

II. *The Board, in denying the charging parties a hearing, and the lower court's affirmance of such denial based upon a record void of evidence and void of findings of basic facts sufficient to support the reasons for the Board's action was a denial of due process of law, and the lower court has rendered a decision in conflict with the principles laid down by this and the lower federal courts, and has decided an important question of federal law in respect to the administration of the National Labor Relations Act, which has not been but should be settled by this court. Such decision calls for this court's power of supervision.*

The record [11] before the lower court was limited to the charging party's motion (Appendix C) and the Board's order denying motion (Appendix D) under 28 U.S.C. 2112 and Section 10 (f) of the Act. Such record contains no evidence or testimony. In the instant case, as in the *Textile Workers of America* vs. *NLRB*, *supra*, the Board made no findings by which a reviewing court could be afforded "means of evaluating the decision." The Board's bald statement is "Against the background of determination of the New Castle operations, General Counsel recommended adoption of this proposal as constituting substantial com-

[11] An appellate court "can consider nothing except what is stated in the record sent up." *Drake* vs. *General Finance Co.*, 119 F. 2d 588 (CA-5).

pliance with the decree." The charging parties and a reviewing court are left in the dark as to what in connection with the background of the termination of the New Castle operations caused the acceptance of what, on its face, is only a partial achievement of the Board's order, nor does the Board set forth reasons which persuaded the General Counsel to force the compromise settlement over the charging party's objections. The Board's order reveals only "that under all circumstances substantial compliance with the Board's order and the court's decree" is achieved by the respondent's proposal. "All circumstances" were not described or identified by the Board nor were the Board's or the lower court's decisions supported by any facts upon which could be drawn the conclusions stated in either the Board's decision or the Court's decision.

In this respect they were in conflict with the decisions of those courts which require administrative agencies to make sufficient findings of fact to support the expressed ultimate fact, and to sustain their reasons and orders pursuant to the requirements of due process of law and Section 10 (c) of the Act. NLRB vs. Capital Transit Co., 221 F. 2d 864, 867 (CA-DC); *Re United Corporation*, 249 F. 2d 168, 180 (CA-3); *Public Utilities Commission of Connecticut* vs. *Federal Power Commission*, 205 F. 2d 116, 119 (CA-3); *Baltimore & Ohio Railroad* vs. *U.S.*, 201 F. 2d 795 (CA-3).

Indeed, it is a rule of this court that in the event the Board exercises a discretion, it must disclose the basis of its discretion and make findings from which it may be determined whether it has exercised its discretion properly. *Phelps-Dodge* vs. *NLRB*, 313 U.S. 177, 197; *Securities & Exchange Commission* vs. *Chenery Corp.*, 318 U.S. 80.

Were this matter one of discretion only, neither the Board nor the lower court would have satisfied the requirements of the foregoing cited cases. Indeed in a case of this charac-

ter, findings of fact to meet the standards of due process are more essential and commanding since such findings present the only means whereby a union which is charged with the duty of honest and forthright representation of its members' best interests (Cf. *Ford Motor Co.* vs. *Huffman*, 345 U.S. 330) can exercise an intelligent discretion in respect to the acceptance or a rejection of the Board's action.

Obviously, the Board did not fulfill the duty cast upon it to make appropriate findings commensurate with the requirements of the statute, Section 10 (c)[12] or due process of law.

III. *The lower court, in holding that the National Labor Relations Board may deprive charging parties and discriminatees of rights acquired under its order without a hearing, has denied such parties due process of law and has rendered a decision in conflict with the principles laid down and accepted by this court, and has decided an important question of federal law which has not been but should be settled by this court.*

Under the Board's order, the charging parties were entitled to certain rights of recognition as the exclusive bargaining agent. Such rights are "property rights." *Fay* vs. *Dowds*, 172 F. 2d 720 (CA-2). Moreover, the discriminatees who were represented by the charging parties had vested rights in the judgment that, by reason of the violation of the Act, the employer owed them back pay and jobs. Discriminatees are entitled, under the order, to back pay, computed in accordance with the directive of the order, and reinstatement and the right to appear on a preferential hiring list if reinstatement is not available.

Deprivation of these rights without a hearing was a de-

[12] Section 10 (c) requires that the Board "shall state its findings of fact."

nial of due process of law. In the case of *Garfield* vs. *Goldsby*, 211 U.S. 249, 262, this court stated:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an *administrative* or judicial proceeding can not be deprived of them without notice and an opportunity to be heard.
>
> "The right to be heard before property is taken or privileges withdrawn which have been previously legally awarded is the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough that its binding obligation has never been questioned in this court." (Italics ours.)

It must be conceded that the charging parties and discriminatees acquired rights in the instant case through administrative and judicial proceedings; thus these rights could not be taken away from them without notice and an opportunity to be heard.

It is long settled that the essential element of due process is an opportunity to be heard and a lack thereof is judicial oppression, *Londoner* vs. *Denver*, 210 U.S. 373; *Morgan* vs. *U.S.*, 304 U.S. 1; and that quasi-judicial proceedings of an administrative body must satisfy the pertinent demands of due process. *Radio Commission* vs. *Nelson Brothers*, 289 U.S. 266.

The vacation of rights of the charging parties and their members, without a hearing and based solely upon the recommendations of the General Counsel, as stated in the Board's order, was a denial of due process of law. Such practice runs counter to the notions of fairness on which

our legal system was founded. Compare *Greene* vs. *McElroy*, 360 U.S. 474, 496.

IV. *The Lower court, in affirming the Board's exoneration of the consequences of the employer's Unfair Labor Practices for less than full compliance with its order, over the objections of the charging party and without a hearing, has decided an important question of Federal Law which has not been but should be settled by this court.*

The Board's initial order, as enforced by the Circuit Court, required:

(1) that Piasecki immediately employ the 133 discriminatees. Eight were offered reinstatement. It is apparent that all discriminatees were not reinstated.

(2) that Piasecki "make whole" each of the 133 discriminatees "for any loss of pay" by paying "to the said individuals a sum of money equal to the amount each would have normally earned as wages from the date he or she would have been hired, absent the discriminatory lockout, to the date of any offer of reinstatement, less his or her net earnings, during such period," and that back pay should accrue until "any offer of reinstatement." According to the Board's answer, filed in the court below, the back pay paid to employees was an "estimate of back pay due" and "a pro rata allocation of the gross back pay settlement." (Answer of the Board, Page 4) Thus it is apparent that the discriminatees did not receive the amount of back pay due them under the order.

(3) that "in the case of those individuals for whom there is insufficient work available," the employer shall be liable for back pay until "each is placed on a preferential list." It is apparent that this part of the order was not fulfilled.

(4) that Piasecki recognize and bargain with the charging

parties upon the offer of reinstatement to any of the discriminatees. It is apparent that this part of the order was not fulfilled.

Thus it is abundantly clear that the Board settled with the employer in such a way as to excuse it from the full consequences of its order, and allowed it the status of compliance without its compliance in fact.

It may be conceded that the Board's finding of substantial compliance is a far cry from the compliance commensurate with and required by its order; nor does the record in this case reveal any basis for the Board's finding of substantial compliance which is so much less than the Board's order required. We find nothing in the statute which allows the Board the right, once it has made an order pursuant to a finding of unfair labor practices, to deprive employees and a charging party of benefits which have accrued under such order. In fact, the statute provides that the jurisdiction of the Court of Appeals shall be exclusive upon the filing of the record of the Board. "Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final * * *." (Section 10 (e)) Moreover, by Section 10 (d), the Board is deprived of jurisdiction to modify its order once the record is filed in the Court of Appeals.[13]

Thus there was no authority in the Board, under the statute, to modify or set aside the requirements of its order or the decree by allowing the employer compliance with the

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[13] "Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it. Thus, Section 10 (d) requires, in event the Board decides to modify or set aside its order, that it give "reasonable notice." In the instant case, the Board did not meet this statutory mandate. The record reveals that the only notice given was a telephone call after the settlement had been accepted by the Regional Director.

order and decree for less than the requirements and demands of the decree. Compare *Wallace Corporation* vs. *NLRB*, 159 F. 2d 952, 956 (CA-4). In such case, the court said that its decree could not be modified or supplemented except upon action by the Board as a prerequisite and in the same manner as the issuance of its initial order. In *Federal Home Loan Bank of San Francisco* vs. *Hall*, 225 F. 2d 349 (CA-9), the court said,

> "* * * at an early date (1838) the Supreme Court announced a rule which has never been abandoned. In *Ex Parte, Siffold* vs. *U.S.*, 12 Pet. 488, 491, 493, 9 L. Ed. 1167, it had this to say: 'Whatever was before the court, and is disposed of is considered as finally settled. The inferior court is bound by the *decree* as the law of case, and must carry it into execution, according to the mandate. They can not vary *it* or examine *it* for any other purpose than execution; nor any other further relief; nor review *it* upon any matter decided upon appeal, for error apparent, nor intermeddle with *it*, further than settle so much of it as has been remanded.' (Emphasis ours.)"

See also *Tribble* vs. *Bruin*, 279 F. 2d 424, 427 (CA-4).

Therefore, it should appear that the Board's exoneration of the demands of its order as enforced by the lower court was an exercise of authority which it did not possess under the statute or under the law.

The Board's authority after the enforcement of the order is confined to an action in the Court of Appeals for a citation for contempt for disobedience of the Court's decree, or in the event there are changed conditions or matters which have been left for subsequent adjudication then it may conduct a hearing in conformity with the requirements of Section 10 (c) of the Act as a continuation of its initial hearing.

NLRB vs. *N. Y. Merchandise Co.* and cases cited *supra*. It has no power after its order is once enforced to modify its initial order so that a respondent may be exonerated from the consequences of its initial order. Such a rule, if otherwise, would encourage pressures upon the Board which would be incompatible with an impartial enforcement of the Act.

Neither does such power reside in the Court of Appeals, for Section 10 (e) and (f) is confined to making "a decree enforcing, modifying, and enforcing as so modified or set aside in whole or in part the order of the Board." The Court of Appeals has no power under the statute to affirm the Board's exoneration of an unfair labor practitioner from the demands of the enforced order after the Board's order has been enforced. It may act only after the Board has conducted a supplemental hearing and made findings of facts. Surely Congress did not intend to cede to the Board or the Court of Appeals such apparent unconstitutional power. (See *Garfield* vs. *Goldsby*, *supra*.)

In the case of *NLRB* vs. *Stackpole Carbon Co.*, 128 F. 2d 188 (CA-3), Page 191, the court said: "The Board's order can not be deemed to be complied with by the employer until the employee to whom the award is due has received his money."

In the case of *Nathanson* vs. *NLRB*, *supra*, this court has said "a back pay order is a command to pay an amount owed the Board as an agent for the injured employees." Thus it is clear that back pay is something that belongs to the employee, not the Board, and although it may act as an agent for the employee, it has no statutory authority to compromise his claim.

It follows therefore that the Board was without power or authority to accept less than the full demands of its enforced order as satisfaction thereof.

CONCLUSION

We believed that when the instant case was brought to the Court of Appeals for review, the Court of Appeals would have decided what rights, if any, charging parties possessed and whether the Board, without a hearing, had the power to accept as satisfaction with its enforced order much less than the order required. The Court of Appeals' opinion provides little enlightenment upon these problems, nor does it afford any guidance for future conduct on the part of the Board or establish procedures in relation to cases such as the instant case.

We have brought this case here because we earnestly believe that the status of charging parties ought to be, once and for all, established. If they have no rights, then in order that the Congressional objective may be ascertained, this court ought to so decide.

We urge a decision by this court so that charging parties, whether they are employers, unions or discriminatees, may know whether they are to be entitled to exercise any means by which they may be protected after a Board's order has been enforced and the matter has been returned to the Board for final disposition.

It appears that both the Board and the Court of Appeals are of the opinion that at this stage of the proceedings, the charging parties are without rights, and they may not object to a settlement effected between the General Counsel and the respondent.

The chance of abuse of the remedial section of the Act, which is the very lifeblood of its value, by such a course should not be allowed, at least without some opportunity on the part of those individuals who must bear the brunt of the Board's deprivations to raise such question before the Board, and upon appeal to the courts. It is clear that Congress intended [illegible](f) to stand as a safeguard against

the possibility of Board abuses, and that Congress intended to preserve for charging parties and other aggrieved persons the right to make a record in support of their positions before the Board for the purposes of a review in the Appellate Court. To deny the charging parties a hearing in this case is to make a mockery of the procedures for review established by Congress in Section 10 (f).

Indeed an evil of the Board's denial of a hearing in this case lies in the fact that such denial effects an evasion of the supervisory jurisdiction over the Board's action in unfair labor practice proceedings lodged in the Appellate Court, the initiation of which pertains to persons aggrieved under Section 10 (f) of the Act, and belongs to the charging parties in this case as a matter of right. The Act demands that any action taken by the Board in connection with its exercise of jurisdiction over unfair labor practice complaints must be exposed to a review by the Court of Appeals pursuant to Section 10 (f) of the Act. Indeed, even the Board's orders are not self executing, but before they may partake of validity they must be enforced by the Court of Appeals pursuant to Section 10 (e) of the Act.

Thus Congress was careful and articulate in its decision not to place final authority in the Board in complaint matters. To have allowed the Board sole and final authority to effect the settlement in the instant case without a review, as contemplated under Section 10 (f), is to offend the Congressional intent which contemplates, in unfair labor practice proceedings, that the Board's actions shall not be final, and that its action shall be subject to review in the Court of Appeals only upon a record which is meaningful and sufficient, and one which will give vitality to the rights secured by Section 10 (f).

This appeal raises the important and novel question in this court for the first time as to what rights, if any, a

charging party may be allowed by way of participation in the proceedings before the Board following the enforcement of the Board's decision and order by the Court of Appeals. Specifically this appeal presents for the first time for this Court's consideration the determination of what procedural or substantial rights were at the charging party's disposal when they refused to agree with the settlement proposal by the General Counsel, which they in good faith could not recommend to the employees they represented.

The effect of the Board's order on the charging parties' motion and the lower court's affirmance of the Board's order is that it is now an established rule of law that charging parties possess no status or standing in a proceeding before the Board after the initial enforcement of the Board's order, even though the decision and order of the Board left unresolved material issues pertaining to the complaint involving reinstatement, back pay and recognition, and that as to any matters which may be left for consideration after the initial enforcement of the Board's order, the General Counsel and the respondent have exclusive and sole authority to settle, even though the charging party may object.

The Board has held that it is no concern of the charging parties whether the General Counsel and the respondent effect a settlement, no matter whether such settlement meets the demands of the Board's order or not. The denial of the Board to the charging party of participation by the traditional democratic method of open hearing in the resolution of the matters which are at issue in this case, after the court's enforcement of the Board's order, is repugnant to concepts of fairness and due process and will result in ceding to the Board and the General Counsel power which the Congress sought to restrain by providing a method of appeal under Section 10 (f).

We respectfully request this court to grant our petition for Writ of Certiorari and ultimately return this matter to the Board so that the petitioners may present evidence to support their position that more than 8 of the 133 discriminatees were entitled to reinstatement, that there was more back pay due and owing the discriminatees, that the discriminatees were entitled to be placed on a preferential hiring list, and that the charging party under the circumstances of this case should be returned the right to represent the employees of the employer upon the reinstatement of any of the discriminatees.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,135

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL NO. 840, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD AND PIASECKI AIRCRAFT CORPORATION

Petition for Review of an Order of the National Labor Relations Board

Argued April 1, 1963

Before BIGGS, *Chief Judge*,* and MCLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 26, 1963)

PER CURIAM.

Petitioners here seek to have set aside the National Labor Relations Board order which denies a motion for back pay proceedings and other relief.

Our study of the record and consideration of arguments on behalf of the parties satisfies us that there is no error in the course the Board followed in this matter. The Union was allowed every opportunity to present its views on the question of compliance and in disapproval of the settlement. The settlement agreement is in substantial accord with the provisions of the decree in our No. 12,912. The petition before us is clearly ancillary to that cause. There has been no abuse of discretion by the Board in working out the settlement of the obligations under our decree. In its set-

* Chief Judge Biggs took no part in the decision of this case.

tlement of the problems presented, the Board reached an admirable, practical result under all of the difficult circumstances. See Piasecki Aircraft Corporation v. National Labor Relations Board, No. 12,912. International Union, etc., et als v. National Labor Relations Board, No. 12,995, 280 F.2d 575 (3 Cir. 1960).

The petition will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,135

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL NO. 840, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD AND PIASECKI AIRCRAFT CORPORATION, *Respondent.*

DECREE

Before: McLaughlin and Staley, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO and its Local No. 840 to review a certain order of the National Labor Relations Board, issued July 9, 1962, wherein the Board denied petitioners' motion for backpay proceedings and other relief. The Court heard argument of respective counsel on April 1, 1963, and has considered the pleadings and briefs filed in this cause. On April 26, 1963, the Court, being fully advised in the premises, handed down its opinion denying the petition for review. In conformity therewith, it is

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated July 9, 1962, denying petitioners' motion for backpay proceedings and other relief, be and it hereby is affirmed.

BY THE COURT.

McLaughlin,
Circuit Judge.

Dated May 22, 1963.

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CA-1496

PIASECKI AIRCRAFT CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL NO. 840

MOTION FOR AN ORDER DIRECTING BACK PAY PROCEEDINGS AND OTHER RELIEF

Now come the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, AFL-CIO, and its Local No. 840, Charging Parties herein, and state that on or about June 20, 1960 the Court of Appeals for the Third Circuit affirmed the Board's Order in the within case and that the Respondent's writ of certiorari with the Supreme Court of the United States was denied on July 9, 1961.

Said Charging Parties further state that as of this date said Respondent Piasecki Aircraft Corporation has not complied with the Board's Order nor has enforcement of said Order been sought by contempt proceedings or back pay proceedings under Sec. 102.52 of the Board's Rules and Regulations although more than sufficient time has elapsed for such purpose.

Said Charging Parties further state that on or about March 25, 1962 [May 25] said Charging Parties were advised by the Regional Director of the Fourth Region of the National Labor Relations Board, by telephone, that a proposed settlement agreement acceptable to him had been made which provided for the payment of $145,000.00 for settlement of all back pay to the discriminatees and the reinstatement of Piasecki's Philadelphia establishment of the following eight discriminatees, to whom will be paid an additional $1,000.00 each as payment for wages lost by reason of Piasecki's failure to transfer said employees to

its Philadelphia establishment when it closed its New Castle establishment:

Paul Andrisani
Matteo CanneLongo
Firore J. DiPaolo
Laurence T. Fisher
John P. Keenan
Edwin A. Loveless
Fred Knise
Andrew Salinski

Said Charging Parties further allege that said proposed settlement does not constitute full compliance with the Board's Order in that said proposed settlement does not provide for the restitution of all back pay owing discriminatees, reinstatement of all employees entitled to reinstatement under the Board's Order, or recognition of the Charging Parties by Piasecki as required under the Board's Order.

Wherefore, Said Charging Parties pray for an order of the Board as follows:

(1) That a back pay proceedings be directed in conformity with Sec. 102.52 of the Board's Rules and Regulations.

(2) That an immediate hearing be set thereon.

(3) That at said hearing the Charging Parties be granted the right to appear in person or by counsel to call, examine and cross-examine witnesses and to introduce in the record documentary or other evidence in conformity with the Rules and R ..ations of the Board.

(4) That the Charging Parties be granted all other and further relief to which they may be entitled in the premises.

LOWELL GOERLICH,
1126 Sixteenth Street, N.W.,
Washington 6, D. C.

Attorney for the Charging Parties.

APPENDIX D

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CA-1496

PIASECKI AIRCRAFT CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL NO. 840

ORDER DENYING MOTION.

On March 25, 1959, the Board issued a Decision and Order [1] in the above-entitled proceeding in which, *inter alia*, it found that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to hire the former employees of its predecessor, Bellanca Aircraft Corporation, because of their membership in the Charging Union. The Board directed the Respondent to reinstate with backpay approximately 133 discriminatees at its New Castle, Delaware, plant; to bargain collectively with the Union at its New Castle plant; and to post notices at that plant. On September 7, 1960, the Court of Appeals for the Third Circuit enforced the Board's Order, and on January 9, 1961, the United States Supreme Court denied certiorari.

Subsequent to the Board's Order and prior to the Circuit Court Decree, the Respondent terminated all operations at its New Castle plant. On August 30, 1961, the Respondent petitioned the Circuit Court for an order to suspend the affirmative provisions of the decree and remand the case to the Board for further hearings on certain questions involving the decree's construction in light of the termination of the New Castle operations. The Court denied the Respondent's petition on September 13, 1961.

Thereafter, pursuant to negotiations for the purpose of

[1] 123 NLRB 348.

obtaining compliance with the outstanding Court Decree, Respondent undertook to make the sum of $153,000 available for satisfying the backpay claims of the discriminatees and to offer employment to eight of these discriminatees at its Philadelphia plant. Against the background of the termination of the New Castle operations, General Counsel recommended adoption of this proposal as constituting substantial compliance with the Decree.

The Union, the Charging Party before the Board, urges the Board to reject the proposal on the ground that it does not constitute full compliance with the Board Order and Court Decree, and has filed a motion for an order directing backpay proceedings in conformity with Section 102.52 of the Board's Rules and Regulations, and for other relief.

The Board having duly considered the matter, is satisfied that under all the circumstances substantial compliance with the Board Order and Court Decree is being achieved by the proposal hereinbefore set forth. Accordingly,

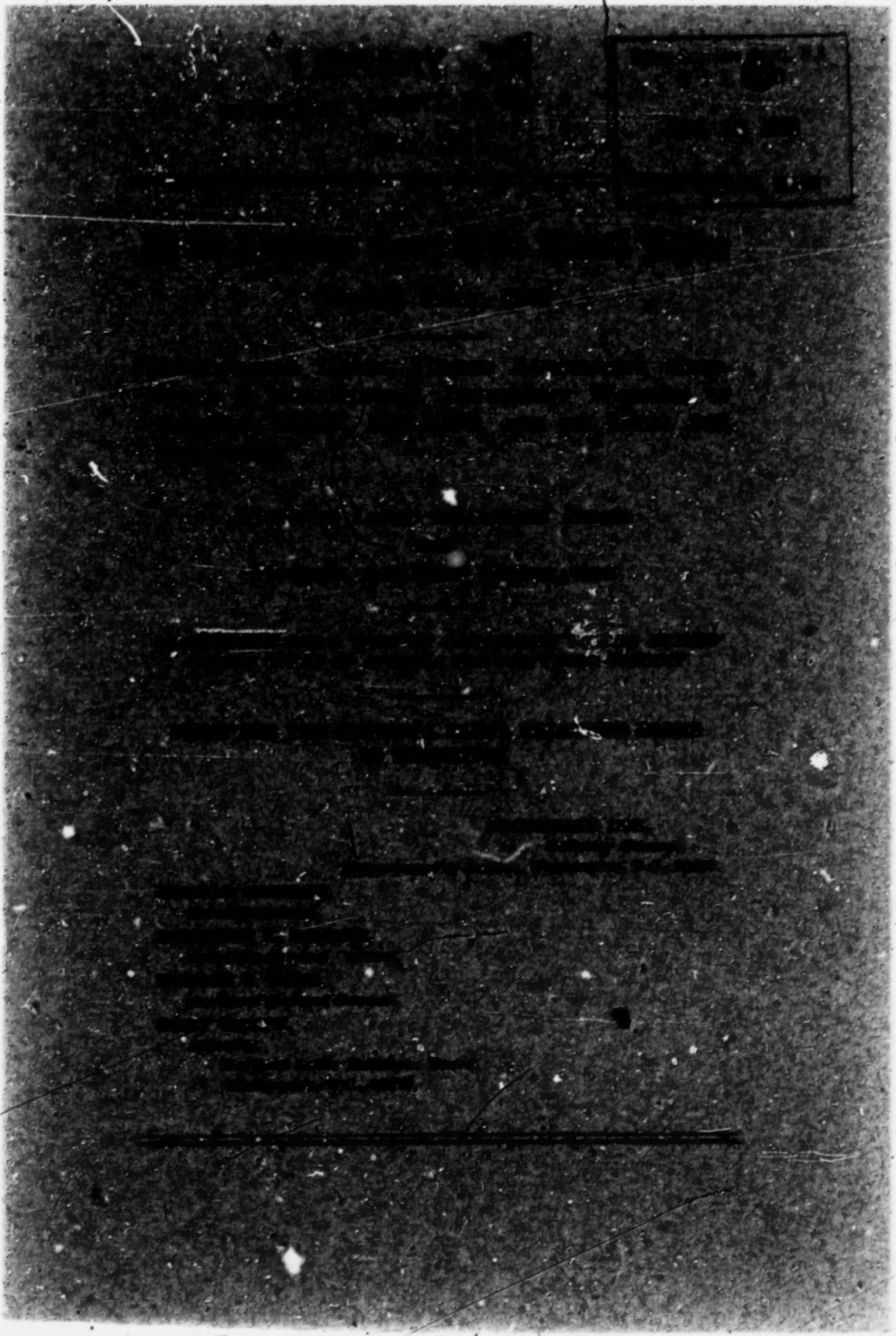
It Is Hereby Ordered that the motion filed by the Charging Party be, and it hereby is, denied.

Dated, Washington, D. C., July 9, 1962

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

(7478-1)



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697-166—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 271

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

AND

PIASECKI AIRCRAFT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 36–37) is reported at 316 F. 2d 239.

JURISDICTION

The decree of the court of appeals (Pet. 38) was entered on May 22, 1963. The petition for a writ of certiorari was filed on July 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board must conduct a formal, trial-type hearing, upon the demand of a charging party, before determining whether substantial compliance with the terms of a court-enforced Board order has been achieved.

2. Whether the Board was reasonable in accepting the compliance proposal submitted to it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 5 of the petition.

STATEMENT

Petitioners, an International Union and its Local (hereafter called "the Union"), seek review of an order of the Board denying their motion that a compliance proposal submitted by the General Counsel of the Board be rejected and that a formal hearing be held. The underlying facts, as they appear from the exhibits attached to the pleadings in the court of appeals,[1] are as follows:

The Union had been party to bargaining agreements with Bellanca Aircraft Corporation covering the employees at Bellanca's New Castle, Delaware, plant. In 1956, Bellanca sold its plant to Piasecki Aircraft Corporation of Philadelphia and the employment of most of the New Castle personnel terminated upon transfer of ownership. Upon charges

[1] The Exhibits attached to the Petition for Review filed by the Union are designated "Pet. Exh." Those attached to the Board's Amended Answer are designated "Bd. Exh."

filed by the Union, and after proceedings under Section 10 of the Act, the Board found, *inter alia*, that Piasecki had discriminatorily refused to hire 133 former Bellanca employees because of their union membership. The Board's order directed Piasecki to cease and desist from the unfair labor practices found, to reinstate these employees with backpay at the New Castle plant, and to bargain collectively with the Union as the representative of the employees at that plant. *Piasecki Aircraft Corporation*, 123 NLRB 348. The court below enforced the Board's order (*Piasecki Aircraft Corporation* v. *National Labor Relations Board*, 280 F. 2d 575 (C.A. 3), certiorari denied, 364 U.S. 912, 933), entering a decree on September 7, 1960 (Pet. 38).

Upon entry of that decree, the Board's Regional Office in Philadelphia began assembling the information necessary to determine the extent of Piasecki's liability. Inquiry was made of the 133 discriminatees regarding their interim earnings from other employment, periods of unavailability for work, extent of search for other employment, and expenses incurred in seeking it (Bd. Exh. 1). In addition, Regional Office personnel examined social security administration records, W-2 income tax forms, and other earnings records. From the information thus obtained, a calculation was made for each individual of quarterly interim earnings from other employment, additional expenses in securing it, and periods of unavailability or loss of qualification for backpay (Bd. Exh. 4).

A putative employment history was then constructed for each discriminatee had he been hired by Piasecki. Each discriminatee was assigned a Piasecki job classification on the basis of his prior experience and skills (Bd. Exh. 8). By reference to Piasecki's employment records at the New Castle plant, it was then ascertained when employees were actually hired in these classifications and their subsequent employment history. The employment opportunities thus revealed were "credited" to the discriminatees according to their seniority and qualifications. A computation was made as to what each discriminatee would have earned had he been in that job with Piasecki, and, from this gross figure, a setoff was made for his interim earnings and periods of unavailability (Amended Answer pp. 3, 4). In this task; the Regional Office personnel were assisted and advised by Charles W. Hypes, an International Representative of the Union, who had been employed at the New Castle plant for many years and had first-hand knowledge of the skills of each discriminatee (Bd. Exhs. 9a, 9b; Amended Answer p. 3).

The investigation also took into account the fact that, in December 1959, Piasecki had shut down the New Castle plant (Amended Answer p. 4). Although no charges were filed alleging that the operation had been terminated for discriminatory reasons or in order to frustrate compliance, the Regional Director considered these possibilities (Bd. Exh. 16). On the basis of his investigation, including the extensive and detailed data supplied by Piasecki (Bd. Exhs. 6, p. 2; 10), he concluded that the shutdown was economically

motivated (Bd. Exh. 16). An investigation was then made to determine whether the discriminatee's rights could be carried over to Piasecki's Philadelphia Plant on the theory that it and New Castle were really a single operation. The Regional Director concluded that, because of the differing nature of the work performed at the two plants, they could not be treated as a single operation, and that a reinstatement obligation at the Philadelphia plants could only be justified with respect to a few of the discriminatees whose skills were such that they might have been transferred to the Philadelphia plant from a job in New Castle (Bd. Exhs. 10, 16).

Union representatives were informed of the progress of compliance efforts, and were asked for their views. In addition to information gained through the participation of Hypes in determining the possible job classifications and of Local 840 officials in assisting in the completion of employee earnings statements, Union representatives received copies of all the voluminous correspondence that passed between the Region and the Company (Amended Answer, p. 5). On February 13, 1962, Lowell Goerlich, Union counsel, and Bert Bothe, UAW Regional Director, conferred with the Regional Director and his staff with regard to the Region's backpay computations and views, and to present their own views in the matter (Amended Answer, p. 6). On April 13, 1962, Goerlich had a conference in Washington with the General Counsel of the Board, at which time he was afforded a similar opportunity to present the Union's position (*ibid.*). On April 26, 1962, after the Com-

pany presented material in support of its assertion that the New Castle plant was closed for economic reasons and that the New Castle and Philadelphia plants were separate enterprises (Bd. Exhs. 10–12), the Regional Director phoned Union Counsel Goerlich. He told Goerlich that it was his judgment that compliance should be accepted on the basis of the payment of back pay for so long as the discriminatees would have been employed at the New Castle plant, with no reinstatement at Philadelphia except for eight employees. The Regional Director invited Goerlich to come to the Regional Office at his earliest convenience to discuss the matter, but the invitation was declined by Goerlich because of other work (Amended Answer, p. 6).

Further discussions between the Regional Director and the Company resulted in an agreement on the terms of the proposed compliance (Bd. Exh. 13). On May 25, Goerlich was informed by the Regional Director of the terms proposed and was given an opportunity to enter into the compliance agreement (Bd. Exh. 14). The offer was refused (*ibid.*), and the Regional Director entered into the agreement without the Union (Bd. Exhs. 15 and 17). Both the International Union and Local 840 sent letters of protest. These were answered in detail by the Regional Director who again explained the basis for the terms accepted and again offered to review with Union representatives any aspect of the compliance they wished to discuss (Bd. Exhs. 14, 16, 18, 19, 20, 21).

The compliance terms accepted (Bd. Exh. 17) provided for the Company to pay $143,000 to the dis-

criminatees, as backpay for employment they would have had at New Castle but for the unfair labor practices. In the opinion of the Regional Director, that sum represented substantially complete compensation for the 95 discriminatees considered entitled to backpay. Of the remaining discriminatees, 10 had interim earnings in excess of the backpay estimated for them, 28 were not credited with any employment at New Castle because the available employment opportunities had been preempted by other discriminatees with greater seniority, and one failed to answer all Board inquiries (Amended Answer, p. 7). The compliance agreement further provided that the eight discriminatees, whose reconstructed work history showed they might have been transferred to Philadelphia, were to be offered employment at the Philadelphia plant and each paid an additional $1,000 in backpay, to cover what they would have earned there absent the discrimination (Bd. Exhs. 13, 14 and 16). Since the New Castle operation had been discontinued for valid reasons and the bargaining requirements of the Board's order ran only to that plant,[2] the compliance agreement did not impose on the Company any obligation to bargain with the Union (Bd. Exhs. 11 and 17).

On June 1, 1962, the Union filed a motion with the Board alleging that the compliance agreement did not "constitute full compliance with the Board's Order in that said proposed settlement does not provide for

[2] See *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d at 591-592 (C.A. 3).

the restitution of all backpay owing discriminatees, reinstatement of all employees entitled to reinstatement under the Board's Order, or recognition of the Charging Parties by Piasecki as required under the Board's Order" (Pet. Exh. B, p. 2). The Union requested the Board to institute formal backpay proceedings which would include a hearing, and to permit the Union to participate in such proceedings (*ibid.*). The Board concluded that, in view of the termination of Piasecki's New Castle operations, it was "satisfied that under all the circumstances substantial compliance with the Board Order and Court Decree" would be achieved by the agreement. It therefore denied the Union's motion (Pet. Exh. C).

The Union then filed in the court below a petition to review the Board's order denying its motion to set aside the compliance agreement and to hold a hearing. The court denied this petition, holding that the Union "was allowed every opportunity to present its views on the question of compliance and in disapproval of the settlement * * * [that] the settlement agreement is in substantial accord with the provisions of the decree * * * [and that] there has been no abuse of discretion by the Board in working out the settlement * * *." The court added: "In its settlement of the problems presented, the Board reached an admirable, practical result under all the difficult circumstances" (Pet. 36–37).

The court concluded that it had jurisdiction to review the question, for the petition was "clearly ancillary" to the original proceeding in which it had enforced the Board's order (Pet. 36).

ARGUMENT

The decision of the court below is clearly correct, there is no conflict of decisions, and no issue warranting review by this Court is presented.

1. Petitioners repeatedly assert (Pet. 17, *passim*) that the Board entered into a compliance agreement with the Company without according them a hearing. But, as the Statement amply demonstrates, petitioners were heard at every stage of the compliance proceedings. Union representatives assisted in the computation of the backpay figures and were kept informed of the progress of the negotiations; Union counsel had personal conferences with the Board's Regional Director and General Counsel respecting the proposed settlement; before the Regional Director arrived at a final decision, he explained the basis therefor to Union counsel and afforded him an opportunity (which he did not accept) to discuss the matter further; and, after the Regional Director made his decision, the Union presented its objections to the compliance agreement to the Board, which, after consideration, found that they did not warrant setting the agreement aside.[1]

Petitioners contend, however, that they were entitled to a trial-type hearing. They urge that, since a

[1] In the light of the procedure followed (which was outlined to the court below in the Board's amended answer and the exhibits attached thereto), petitioners err in stating that there is no factual basis for the court's conclusion that the Union was allowed every opportunity to present its views (Pet. 9, n. 2), and that the Board based its order solely upon the recommendation of the General Counsel (Pet. 22–23).

trial-type hearing is provided (and indeed required) when the Board first finds that unfair labor practices have been committed and enters its remedial order, the same procedure must be utilized in determining whether there has been compliance with that order, on the theory that the compliance proceeding is merely a continuation of the original proceeding (Pet. 18–20). This contention reflects a fundamental misconception of the nature of compliance proceedings and the powers of the Board.

The Board enforces "public" and not "private" rights, and accordingly it has exclusive power to determine, not only when proceedings to enforce its orders shall be instituted, but also whether contempt proceedings shall be instituted for failure to comply with a court enforcement decree. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. The power to determine whether to institute contempt proceedings necessarily includes the power to evaluate the sufficiency of compliance with a court decree. Although Section 10(c) provides a formal hearing procedure for determining the initial question whether an unfair labor practice has been committed and the remedy therefor, the Act does not specify any particular procedure for determining compliance questions. This is because questions of compliance, like the question whether an unfair labor practice charge shall be "settled" rather than taken to formal proceedings, involve problems which are often best determined by informal administrative proceedings rather than by a trial-type hearing. For example, it

may be necessary, as with the closing of the New Castle plant here, to make an adjustment for changed conditions. Or, it may be necessary to make a judgment as to whether, in view of the lapse of time since commission of the unfair labor practices and the hazards of future litigation, a lesser measure of relief would better effectuate the policies of the Act than would greater relief attained at some uncertain time in the future. Thus, it has consistently been recognized that the Board may properly work out the details of compliance by "negotiation" in appropriate situations, without the necessity for resorting to a supplemental trial. *Nathanson* (Mackenzie Coach Lines) v. *National Labor Relations Board*, 344 U.S. 25, 29–30; *Vapor Blast Independent Shop Worker's Ass'n* v. *Simon*, 305 F. 2d 717, 719–720 (C.A. 7); *National Labor Relations Board* v. *Ozark Hardwood Co.*, 282 F. 2d 1, 8–9 (C.A. 8). Such informal settlement is consistent with due process. See *Federal Communications Commision* v. *WJR*, 337 U.S. 265, 274–276; *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79, 88; *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

The cases relied upon by petitioners (Pet. 14–15) are inapposite. In *Textile Workers of America* v. *National Labor Relations Board*, 294 F. 2d 738 (C.A. D.C.), and *Local Union No. 112, Intl. Union Allied Industrial Workers* v. *Rothman*, 209 F. Supp. 295 (D. D.C.), settlements were accepted without explaining the reasons therefor to the charging party and affording it an opportunity to present its views. Neither of these cases holds that a formal trial-type

hearing was required. This is shown by the supplemental decision in *Textile Workers*, 315 F. 2d 41 (C.A. D.C.), not cited by petitioners, which sustained the settlement after the Board had explained the reasons therefor. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board*, 202 F. 2d 546 (C.A. 3), held that, after issuance of a complaint, unfair labor practice charges could not be settled over the objection of the charging party but had to proceed to formal hearing under Section 10 of the Act. The court, however, recognized that the situation might be different where, as here, an unfair labor practice order had issued and the question of compliance was involved (see 202 F. 2d at 547, n. 3). Indeed, by sustaining the Board's action in this case, the Third Circuit confirmed that its earlier decision in *Marine Engineers* has no application to the situation here.

2. Both in their motion to the Board (Pet. 39–40) and here, petitioners merely assert an abstract right to a trial-type hearing without showing that the result would have been any different had one been held. Petitioners do not challenge the validity of the assumption on which the Regional Director entered into, and the Board approved, the compliance agreement with the Company; they simply contend that, since the agreement did not provide for fulfilling every term of the Board's order, the Board lacked authority to accept it without according them a full hearing (Pet. 28–31). In view of the shut down of the New Castle plant for economic reasons, literal compliance with every term of the Board's order was

manifestly impossible. The Board could not have insisted that the employees be reinstated to jobs which were no longer in existence, nor, absent a basis for concluding that the jobs at the New Castle plant were interchangeable with those at the Philadelphia plant, could it have automatically transferred the reinstatement obligation from the former to the latter. Similarly, since the bargaining obligation was imposed only on the assumption that the Union would represent a majority of the employees at the New Castle plant (*supra*, p. 7), it could not properly be extended to Philadelphia where the Union would at most represent only eight employees. The only part of the order which could properly be implemented in these circumstances was the back pay remedy, and there is no suggestion that the total sum of $14,000, which represented substantially complete compensation for the 95 discriminatees entitled to backpay (*supra*, p. 7), did not adequately discharge the backpay obligation. Accordingly, the court below correctly concluded that there was "no abuse of discretion by the Board" (Pet. 36–37).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1963.

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No. 271

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

and

PIASECKI AIRCRAFT CORPORATION

BRIEF IN REPLY TO NATIONAL LABOR RELATIONS BOARD'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 271

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD,

and

PIASECKI AIRCRAFT CORPORATION

BRIEF IN REPLY TO NATIONAL LABOR RELATIONS BOARD'S BRIEF IN OPPOSITION

Petitioners' primary purpose in filing this Brief in Reply in this matter is to call attention to the fact that the Board's counsel in this Court appears to have departed from the theory which was advanced by the Board's counsel in the lower court. Moreover, the Board's counsel in this Court also expresses the view that "the Act does not specify any particular procedure for determining compliance questions."

Thus clarification of such procedure and a determination as to whether the proceeding before the Board was a "con-

pliance" proceeding would be most helpful in the administration of the Act in that such matters are presently unsettled and parties are uncertain of their rights. Under the present state of the law, not only are charging parties uncertain as to the procedure to be followed and the nature of the proceedings, but there appears to be variance of opinion between the Board's counsel.

The Board's counsel in this Court maintains that the instant proceeding before the Board is a compliance proceeding, in relation to which the Board may exercise unilaterally the same exclusive power as in a contempt proceeding instituted for failure to comply with a "court enforcement decree," i.e., the exclusive "power to evaluate the sufficiency of the compliance with a court decree." This theory stems from the proposition that the Board is enforcing a "public right," of which the charging parties have no concern and in respect to which they may exercise no rights or remedies.

The Board's counsel erroneously views the proceeding before the Board as a compliance proceeding and thus equates it with a contempt proceeding. The proceeding before the Board was neither a contempt proceeding nor a compliance proceeding, but the continuation of the second stage of an original proceeding instituted under Section 10 (c) of the Act, the purpose of which was to compute back pay and resolve reinstatement placement of discriminatees and other issues which were left unsettled by its initial order. Under the Board's counsel's theory, charging parties would have had no standing before the Board and thus no right of appeal under Section 10 (f), nor any other rights, all of which means that the charging parties are impotent to challenge or contest the Board's unilateral computation of back pay and reinstatment placement of discriminatees.

The Board's counsel in this Court cites no authority to support such position, but draws an inference from *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261. The Court in this case was careful to note the distinction between an appeal under Section 10 (f) and a contempt proceeding. The Court pointed out under 10 (f) that the charging party is "afforded opportunity to *contest* a final order." Section 10 (f) "seeks not to require compliance with the Board's order but to overturn it."

In the instant case, the charging parties seek to "contest" the Board's final action in respect to its computation of back pay, its placement of discriminatees, its treatment of the bargaining rights of the charging parties and its determination that no discriminatee shall be placed on a preferential hiring list. These findings are what the charging parties want overturned. For this purpose, charging parties requested a hearing for the right to contest is a futile gesture unless a forum is provided for such contest. It is clear that the matters which the charging parties desire to have overturned are not compliance matters but are matters which invoke the Board's original jurisdiction under Section 10 (c), the litigation of which is a continuation of the initial proceedings. *NLRB v. CCC Association*, 306 F. 2d 534 (CA-2); *NLRB v. New York Merchandising Co.*, 134 F. 2d 949, (CA-2).

As Justice Frankfurter pointed out in *NLRB v. Deena Artware*, 361 U.S. 398, 399, the present proceeding before the Board is the second stage of a two-stage proceeding. Justice Frankfurter further declared that at this stage of the proceeding, "The determination of the specific liabilities may involve *a protracted contest*" and is excluded from the first stage of the proceeding "in the interests of efficient administration of the Act." (Italics ours.)

In the instant case, charging parties were both unlaw-

fully deprived of the right to contest as described by Justice Frankfurter, and the right to contest the results of such contest under Section 10 (f).

Had the Board, as it sometimes does, litigated reinstatement rights in its initial hearing (See Philip Carey, 140 NLRB 90), or set the matter for hearing under Section 102.52, Board's Rules and Regulations, the charging parties would have been afforded a hearing with the right to appeal under 10 (f) in the event they were aggrieved by the Board's action which they were denied in the instant case.

Certainly expediency in the Board's procedures should not be the basis for denying charging parties what otherwise would be their rights. Indeed if the Board may deny a hearing to the charging parties in the second stage of the same proceeding, it would follow that it may deny a hearing to charging parties in the first stage. We find no authority to support such a proposition.

From the foregoing, if is clear that charging parties should not have been denied a hearing and a subsequent appeal under Section 10 (f), if necessary, on the ground that the proceeding before the Board was a compliance proceeding and the Board thus possessed "exclusive power to determine" unilaterally all matters which were before the Board in this second stage of the initial proceeding.

The Board's counsel in the lower court did not take such an extreme position. Such counsel argued that since the order of the Board concerns the administrative handling of the case subsequent to the entry of decree and does not involve any unfair labor practice findings or order, the order is not a final order within the meaning of Section 10 (f) and "an original action of review under that section may not be predicated thereon."

However, Board's counsel did concede that "The Board

nevertheless acknowledges that this court has jurisdiction to entertain the union's petition * * *"

Pursuant to this theory, no doubt, Board's counsel filed in the lower court a Motion to Dismiss the Petition for Review and Treat It as a Petition for A Writ of Mandamus[1] and Other Relief Ancillary to Case No. 12,912. The lower court did not specifically pass upon this Motion or the charging parties' Motion in the alternative requesting the lower court to set the matter for hearing in the event the Board's motion were granted. The action in mandamus envisioned compelling the Board to institute an action for contempt against Piasecki on the ground that it had not complied with the decree. It is obvious that such an action would fail since the contempt action against Piasecki would not lie until the back pay was liquidated by the Board and reinstatement-placement of discriminatees declared. *NLRB v. Deena Artware*, 361 U.S. 398, 400; 202 F. 2d 798, 802 and 261 F. 2d 503, 508 (CA-6). Obviously mandamus will not lie to force the Board to seek a remedy to which it was not entitled. Moreover, if discretion were involved, as Board's counsel maintained, mandamus would not lie. *Panama Canal v. Grace Line, Inc.*, 356 U.S. 309, 318. Mandamus is restricted to "situations where ministerial duties of a non-discretionary nature" are involved. In *NLRB v. New York Merchandising Co., supra*, 952, the Court said: "We can not delegate to the Board power to fill in the amount of back pay as a merely ministerial duty."

Thus the theory of the Board's counsel in the Court below

[1] Board's counsel stated in its Reply Brief, page 2, "Since the Court already has jurisdiction over this case as a result of the prior review and enforcement proceedings, the union's request for an affirmative order against the Board may appropriately be treated by the Court as an application for mandamus."

that the appeal was a proceeding in mandamus[2] likewise must fail, and the proceeding before the Board must be viewed as one subject to review under Section 10 (f); thus the charging parties were entitled to a hearing before the Board. If the Court below adopted the theory of Board's counsel, the Court is in conflict with the foregoing cited cases since the action before the Board was not one sounding in mandamus or contempt, but it was the second stage of an original proceeding under Section 10 (c). It was not ancillary to the enforcement proceedings in cause 12,912 but was the second stage of the original proceeding in Case No. 4-CA-1496 before the Board. In *NLRB* v. *New York Merchandising Co., supra*, the Court said such a proceedings is not "part of a proceeding for contempt."

The manner in which the lower court exercised jurisdiction is not clear except that it treated the charging parties' appeal erroneously as "ancillary" to cause 12,912. Whether this means that the Court was treating the charging parties' appeal as one in mandamus or as an appeal under 10 (f), is not specifically detailed by the Court. The Court satisfied its affirmance of the Board's order with several observations which are neither supported by the facts in the record nor was any competent evidence presented in the lower court to sustain such observations.

The Court held that the settlement agreement was in "substantial accord" with its order. The Board used the words "substantial compliance." Whether the Court's choice of "accord" instead of "compliance" indicated that it believed that the proceeding was not a compliance proceeding is also unclear.

In any event, neither the Board nor the Court set forth

[2] Board's counsel in this Court did not mention the word mandamus at all in the argument; nor did the lower court mention mandamus in its opinion.

facts upon which its findings of substantial "compliance" or "accord" can be sustained. In fact, comparison of the settlement with the decree results in an opposite conclusion. Certainly "substantial" compliance or accord is not effected:

1. When only 8 out of 133 discriminatees are reinstated;
2. When for five years of potential unemployment, these 133 discriminatees received the sum of $151,000 as back pay, although estimated back pay was as high as as $500,000;
3. When the back pay paid to the discriminatees who lost employment for almost five years, based on a rate of $40.00 a week, does not exceed a year's pay for all employees;
4. When Jas received no back pay at all, although the original order of the Board found that Piasecki had hired "between 155 and 175 production employees at the New Castle Plant," more than the total number of discriminatees, 123 NLRB 348, 349;
5. When the union was denied its rights of representation without reasons;
6. And when the discriminatees were denied their preferential hiring rights.

Indeed, under these facts, it would appear that there was most unsubstantial compliance with the decree.[2] Had the

[2] The extreme variance between the entered order and the decree was tantamount to a modification or change in the decree which neither the Board nor the Court had power to effect without a subsequent hearing by the Board for such purpose. *Wallace Corp. v. NLRB*, 159 F. 2d 952, 956 (CA 4): "* * * action by the Board is a prerequisite to any modification or change of the decree on such grounds [whether substantially

charging parties been granted a hearing, facts would have been developed which would have shown, for example, that there was a greater amount of back pay due, for by its answer, the Board itself admitted that there was more back pay due than paid discriminatees since it averred that "the resultant figures were used as an estimate of back pay and as a basis for negotiations and eventual pro-rata of the gross back pay settlement." If total back pay were computed, it is obvious that the total amount was not paid to the discriminatees. Moreover, while at least 155 employees were hired at the Piasecki New Castle Plant, more than all of the discriminatees, 14 who had no income received no back pay. There can be no doubt that had this matter been litigated before the Board, a larger back pay to discriminatees would have resulted.

Nor are there findings before the Board, or before the Court, which support an acceptance of less than the full amount of back pay. In fact, the Board violated the teachings of this Court when it failed to "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress had empowered it." *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197.

Thus it is obvious that the result would have been different had the case been heard before the Board. The assertions of the Board's counsel and the Board's answer filed in the lower court are the Board's counsel's *post hoc* rationalizations of the Board's unlawful action.

In the case of *Burlington Truck Line, Inc.* v. *United States*, 83 S. Ct. 239, 246, the Court said:

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equivalent positions remained after the abolishment of a department." Both the Board and the Court were in error in effecting a modification of the enforced order without a hearing upon the pretense of "substantial" compliance with the order. *Federal Home Loan Bank of San Francisco* v. *Hall*, 225 F. 2d 349, Footnote 10, page 372 (CA-9).

"The courts may not accept appellate counsels' *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

> '[A] simple but fundamental rule of administrative law * * * is * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action * * *" (Ibid)

For the courts to substitute their or counsel's discretion for that of the commission is incompatible with the orderly functioning of the process of judicial review."

The position of the Board as espoused in the lower court and in this Court and the lower court's action run afoul of the teachings of this case.[4] An examination of the Board's answer indicates that the settlement was not based upon the Board's own independent investigations and findings, but upon unsupported, self-serving declarations of Piasecki, which were not in accord with the Board's administrative findings of fact. For example, the Regional Office had found that the New Castle and Philadelphia plants were "a common undertaking" and "for the purposes of compliance, the New Castle and Philadelphia plants should be considered a single enterprise," that there was an inter-

[4] Indeed, the Board relied upon the recommendations of Board's General Counsel in adopting the settlement proposal.

change between employees of both plants and that "under the circumstances we interpret the New Castle plant in the decree to encompass the Philadelphia plant." (See letter of August 22, 1961, Exhibit 7 to Board's answer.)

At most the answer of the Board simply puts into issue certain claims of the Board for which no evidence was produced in the lower court. As noted in our brief, if the matters set forth in the Board's answer were pertinent for consideration in the lower court, the charging parties should have been given an opportunity to produce evidence in opposition to the assertions made by the Board, and the Board should have been required to substantiate its allegations by proof. (Rule 19, Rules for Court of Appeals, Third Circuit.)

As noted above, the lower court did not pass upon the charging parties' motion which was filed for such purpose. The upshot of the proceedings was that the charging parties were not only denied a hearing before the Board, but were denied a hearing in the lower court upon these factual matters which apparently the lower court considered in affirming the Board's order. Had the charging parties been afforded the right to a hearing in either case, there is no question that the result would have been different.

The need for determination of the questions involved herein by this Court seems more demanding in that there is a variance of opinion of the Board's counsel as to what rights charging parties may have in the second stage of the Board's original proceeding on unfair labor practices. The counsel for the Board in this Court asserts that the charging parties are without rights, which contemplates unbounded exclusive power with the Board; the Board's counsel in the lower court concedes that the charging parties have rights but these rights must be pursued in a mandamus action in the Appellate Court and not before the Board;

the Court below appears to take the position that the charging parties' rights are limited to the "opportunity to present (their) views"; the charging parties claim that they are entitled to a hearing before the Board and the right to a review under Section 10 (f) of the Act, if necessary.

The procedure and the rights of the charging parties should be established by this Court as an aid in the administration of the Act.

By not again referring to those matters in our brief which were passed over without mention by the Board's counsel in this Court, we do not mean to minimize their importance or persuasive power.

Thus we pray as in our petition.

Respectfully submitted,

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